United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1453

To be argued by
WILLIAM J. KELLEHER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1453

UNITED STATES OF AMERICA,
Appellee,

—v.—

KENNETH BROWN and ERIC DANIELS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM J. KELLEHER, JR.,
FREDERICK T. DAVIS,
Assistant United States Attorneys
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

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Preliminary Statement

Eric Daniels and Kenneth Brown appeal from judgments of conviction entered on September 21, 1976, in the United States District Court for the Southern District of New York after a seven-day trial before the Honorable Gerard L. Goettel, United States District Judge, and a jury.

Indictment 76 Cr. 476, filed May 13, 1976, charged Eric Daniels, Don Daniels,* Kenneth Brown, Sylvia Diaz and Patricia Booth Cornwall in Count One with conspiracy to commit an armed robbery of United States

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* Don Daniels, who was also convicted, filed a notice of appeal on September 21, 1976, but has filed neither a brief nor an appendix.

Postal Employees and conspiracy to possess blank, stolen United States Postal Money Orders with intent to convert them to their own purposes, in violation of Title 18, United States Code, Section 371. Count Two of the indictment charged all of the defendants with robbery of United States Postal Employees, in violation of Title 18, United States Code Section 2114. Count Three charged all defendants with putting the lives of postal employees in jeopardy by use of firearms, during the robbery charged in Count Two, in violation of Title 18, United States Code, Section 2114. Count Four charged each of the defendants with possession of stolen, blank United States money orders with intent to convert them to their own use, in violation of Title 18, United States Code, Section 500. Counts Two, Three and Four additionally charged the defendants with aiding and abetting the commission of the crimes charged in those counts, Title 18, United States Code, Section 2.

On June 21, 1976, trial commenced for defendants Eric Daniels, Don Daniels and Kenneth Brown and on June 29, 1976, they were convicted on all four counts. Defendants Patricia Booth Cornwall plead guilty to Count One of the indictment, the conspiracy count, on June 23, 1976, and defendant Sylvia Diaz plead guilty to Count Four of the indictment on October 19, 1976.

On September 21, 1976, Eric Daniels, Don Daniels and Kenneth Brown were sentenced to three years imprisonment on Count One; the mandatory twenty-five years imprisonment on Counts Two and Three, execution of sentence suspended and five years imprisonment on Count Four to run consecutively to the three years imposed under Count One. These defendants are currently serving their sentences.

Statement of Facts

The Government's Case

A. Synopsis

This case involved the robbery of the Hellgate Station of the United States Post Office on May 1, 1976, by Don Daniels, Eric Daniels and Kenneth Brown. The Government's evidence consisted of the testimony of an admitted participant in some of the acts, one Patricia Cornwall, as well as testimony of others in whom the defendants confided in making their plans to rob the station. In addition, many items relating to the theft, including material stolen from the Post Office, were found in an apartment used by the defendant; also found were numerous pieces of evidence demonstrating the complicity of each of the defendants.

B. The Robbery

At about 7:50 A.M., on Saturday, May 1, 1976, three armed black men held up the Hellgate Station Post Office located at 153 E. 110th St. (Tr. 147-148, 202, 229, 265, 305).* At least one of the men was wearing a blue jumpsuit and a ski mask and one was wearing a Post Office sweater and a hat (Tr. 150, 154, 204, 230, 266, 279). The robbery of the Post Office was accomplished with the use of a rifle (GX 2) and a hand gun (GX 3; Tr. 151, 204, 229, 232). The robbers herded the postal employees into the vault and shut the inside gate of the vault, and carried the proceeds of their robbery

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*Citations to "Tr." refer to pages in the trial transcript; "GX" refers to Government's Exhibits.

in two army-type duffle bags (GX 1; Tr. 154, 206, 152, 208, 280). In addition the phone wires outside the vault were cut (Tr. 233). The robbers then left the Post Office.*

At about 8 o'clock, the manager of the Hellgate Station Post Office came down to the vault floor and found the employees locked in the vault. Subsequently the manager took a survey of what was missing. The major items stolen during the robbery included 1,004 domestic money orders, a money order machine, the plates needed to write up the money orders, and seven Post Office boxes and a ledger used to record sold money orders (Tr. 373, 320, 321, 328, 332, 332-336, 373, 381; GX 8, 97, 124, 123, 1A, 1B, 1C, 1D, 1E, 1F, 1G, 52 and 52a-52d). The domestic money orders could each be written up to a maximum amount of $300.000 each (Tr. 328).

Two days later a blue jumpsuit and blue ski-mask were found in the Post Office thrown behind some work skids (Tr. 179-198; GX 134, 134A).

C. The Preparation for the Robbery

Patricia Booth Cornwall, an employee of the United States Post Office, Hellgate Station, 153 E. 110th St., from May of 1969 to May of 1976 previously had resided with an individual by the name of Raymond Pitner at 413 E. 117th St. until she moved to 1295 Fifth Avenue with him on February 14, 1975 (Tr. 475).

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* Another postal employee had been in the outside garage bay area of the Hellgate Station and had seen three black men walking into the Post Office. The first man, wearing a Postal Sweater (GX 94) and hat (GX 158) was identified from a photo spread as Eric Daniels (GX 159) and was also so identified in court (Tr. 278-279, 286, 297, 282-285).

Pitner took his belongings with him to 1295 Fifth Avenue when he moved. Subsequently Pitner and Cornwall had a falling out and Pitner moved out in January or February 1976. Sometime in March 1976, the defendant Don Daniels moved into Cornwall's apartment (Tr. 475-479). Cornwall had met Don Daniels in December of 1975 through defendant Eric Daniels, who was at the time living with his sister in the apartment next door, 15F (Tr. 479-480). In December 1975, Cornwall had met an individual by the name of "Cardine" while at Sylvia Diaz's apartment. Eric Daniels had moved in with Diaz, whose apartment was also at 1295 Fifth Avenue. "Cardine," who was later identified as defendant Kenneth Brown, was introduced to Cornwall by Eric Daniels (Tr. 485-486).

When Pitner moved out he had left several of his personal belongings among which were a rifle (GX 2) and a postal sweater (GX 94) and some personal papers (Tr. 481-482, 483). Towards the end of March 1976, Cornwall had a conversation with Don Daniels concerning Pitner's left belongings, at which time Don Daniels said he was going to throw them out (Tr. 484). About a week later, Cornwall found Pitner's belongings gone; however, the rifle was still in her apartment (Tr. 485). Approximately two weeks prior to May 1, 1976, Cornwall, accompanied by Don Daniels, went to the Hellgate Station of the Post Office to pick up her paycheck. At that time he was introduced to one of the other Postal employees while standing with Cornwall in an area which was restricted to the public. About one week later Don Daniels picked Cornwall up at the Post Office after work (Tr. 190, 486-487).

On April 27, 1976, the Tuesday before the Saturday, May 1, robbery of the Post Office, Don Daniels and Cornwall were in her apartment when he inquired what valuables were kept in the Post Office, where the money

orders were stored, what was the security at the Post Office and whether or not there was an armed guard (Tr. 488-489). She advised him there was no regular guard on the week-end and he advised her that he was thinking of robbing the Post Office (Tr. 488-490). Daniels then dictated a list of equipment to be used to accomplish the robbery of the Post Office (GX 21) to Cornwall and advised Cornwall to empty his duffle bag that he planned to use in the robbery (Tr. 491-493).

The next day, Wednesday, April 28, 1976, Daniels asked Cornwall to draw a diagram of the Post Office, and she drew a picture of the outside of the Post Office (Tr. 502-504; GX 26A-26C). Daniels advised that he wanted a floor plan of the inside, not the drawing of the outside of the Post Office and Cornwall complied, showing locations of doors, telephones and where the dispatcher sometimes sat with a gun (GX 27A-27D; Tr. 510-514, 521-523). On the reverse side of the floor plan, at Daniels' request she drew a diagram of the walk-in-vault at Hellgate Station (Tr. 517-518; GX 27A-27D). Daniels put all three of the diagrams into his shoulder bag (GX 95; Tr. 535). Additionally, upon Daniel's request, Cornwall advised where the Money Orders were located in the vault (Tr. 524-525). Cornwall also provided Daniels with the location of money order ledgers (GX 52, 52A-52D) was as well as the location of clerk stamp boxes and cash boxes (Tr. 524-525; GX 1-1G).

Later, on Wednesday, Daniels said they may need a car and had Cornwall look in the yellow pages for a car rental at an airport (Tr. 526).

On the evening of the following day, Thursday, Don Daniels told Cornwall that they were going to see his brother Eric Daniels at his studio on East 23rd Street in Manhattan (Tr. 535-536). When they arrived at the studio, Eric and Don Daniels went over the diagrams and Eric Daniels said he was going to call "Cardine."

He then made a phone call at the completion of which Eric advised Don and Cornwall, "Okay, Cardine's in on the robbery and we have our own artillery." (Tr. 537-538).

Don Daniels brought two blue jumpsuits (GX 134) to Cornwall's apartment on the next day, Friday, and told Cornwall to cut the labels out, stating that one of them was for his brother Eric Daniels (Tr. 539-546). Don then called his brother Eric and told his brother that he, Don, had procured the uniforms. Don then advised Eric that Cardine is going to get "the other stuff" (Tr. 546).

Later on that Friday evening Don went out and came back to the apartment at 1295 Fifth Ave. with Kenneth Brown (Tr. 547-548). Brown arrived with a black case (GX 93) and took out an automatic pistol (GX 3) and showed it to Don Daniels (Tr. 548-549). Don then showed Brown the diagrams of the Post Office, the ensuing discussion including; entrances to the Post Office, the back door, the vault, location of the money order validation plate and money order machine, and the front of the building where the garage bay was (Tr. 550-551). Don and Brown left, taking the diagrams with them; Don stated that they wanted to look around the area of the Post Office (Tr. 552). Cornwall then went to sleep (Tr. 552).

On this same date, Friday, April 30, 1976, between the hours of 6 P.M. and 8:30 P.M., an individual by the name of Katherine Stubbington, who was assisting Eric Daniels in the formation of a health food business known as the "Vegetable Patch," called Eric Daniels. Eric requested that Stubbington get herself some false identification because he was going to come into possession of government checks very soon (Tr. 1007-1009, 1011).

Cornwall, who had fallen asleep in the apartment at 1295 5th Avenue, was awakened sometime during the night by Don Daniels who had returned from his reconnizance trip with Brown. Don gave Cornwall a piece of paper with a phone number on it and told her to call that number after she got to work in the morning and found that the safe had been opened. He also informed Cornwall that the phone was a pay phone on 109th Street (Tr. 552-553).

The next morning, Cornwall went to her job on the second floor at the Hellgate Station Post Office, waited, went downstairs, saw the vault was opened and called the telephone number given to her by Don Daniels the night before. After a few unsuccessful calls she finally reached Eric Daniels who inquired whether the vault was open, the number of people on the vault floor and whether anyone was wearing the gun. Cornwall advised him that the vault was open, that there was five or six people on the floor and further told him she did not think anyone was wearing the gun (Tr. 553-555).

D. The Thieves Attempt to Procure False Identification

The same morning of the robbery at about 11:30 A.M., Katherine Stubbington received a phone call from Eric Daniels at which time he told her: "I got it, I have it. It's all in front of me. I got everything, I got a code book, I've got the ledgers and you don't have to worry about it. They won't even know its gone until Monday. These are United States government checks. They are United States postal money orders . . ." (Tr. 1010). Eric then asked her to help obtain false identification and told her the money orders would be made up in denominations of $300.00 and that they would go from department store to department store that afternoon working in teams.

The agreement was that Stubbington would purchase something and whatever she bought she would get to keep and would make $100.00 for each money order (Tr. 1010-1011). After speaking with Eric Daniels, Stubbington called the Postal Inspection Service and later received a phone call from Postal Inspector Mackin. After speaking with Inspector Mackin, Stubbington attempted to call Eric back at the same number she had called the night before. Stubbington was advised by Don Daniels that Eric Daniels was not there but would be right back. Stubbington told Don to tell Eric when he gets back, that she got "it" to which Don replied "DYNAMITE." Ten or fifteen minutes later, Stubbington called back and this time spoke with Eric, who gave her directions to 22 West 121st Street near Lenox Avenue advising her that he was in a basement apartment at that address and that she should knock on the window or ring the bell. Stubbington then called Inspector Mackin and told him that the arrangements had been made and 45 minutes later she was picked up by Postal Inspectors Monroe and Upthegrove (Tr. 1010-1015). Monroe took Stubbington to the Bronx Post Office where Stubbington again called Eric Daniels with Monroe listening on an extension phone. Stubbington advised Eric that she had someone who could provide false identifications. Eric then gave Stubbington descriptions, heights and weights for three people (Tr. 1015-1016). Eric told Stubbington to bring her friend along and that he, Eric, would throw the friend a "couple of hundred" (Tr. 1015).

Stubbington and Monroe took a cab to 22 West 121st Street and knocked on the basement window as instructed. Someone looked through the shutter and then Kenneth Brown, who introduced himself as "Gene," opened a gate leading to the small court-yard and let them in. In the apartment were Don Daniels, Kenneth Brown and Sylvia Diaz, who took Monroe's coat and ran her hands up and

down Monroe's sides. Stacks of money orders were on the couch in the apartment. Additionally, a money order machine (GX 97) was on the coffee table (Tr. 1017-1019, 1021) and a black bag (GX 93) was on the couch (Tr. 1019, 1023, 1023-24) with money orders in it. Stubbington picked up a money order and handed it to Monroe and asked Monroe if he could make one. Monroe then showed a certificate of title for a car to Kenneth Brown, who jumped up and down asking Monroe if he could make one for a Mercedes Benz (Tr. 1019). Kenneth Brown further inquired as to the possibility of using such documents to open a line of credit (Tr. 1020). Don and Kenneth Brown gave their descriptions to Monroe and Stubbington with Brown requesting more than one set. Brown and Don Daniels told Monroe that they didn't have to worry about being paid for the identification since Eric would take care of it.*

E. The Seizures at 22 W. 121 Street

Monroe had been at the Hellgate Station at about 12 noon prior to his visit to 22 West 121st Street and was aware of the series numbers of the 1,004 stolen money orders (Tr. 722-727). Upon leaving the apartment at 22 West 121st Street, Monroe advised fellow postal inspectors and police who were on surveillance outside the apartment of the description of those on the inside of the apartment and additionally gave them a description

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* Stubbington and Monroe had gone into the apartment at about 3:30-4:30 p.m. and left after approximately 15 minutes (Tr. 730). Eric Daniels was not present in the apartment during Monroe's visit since Cornwall, upon leaving work at 2:30 p.m. that day, found that she had forgotten her keys. Eric, who obtained a set of keys from Don, picked Cornwall up and then drove down to his studio on East 23rd Street and then returned to 22 West 121 Street (Tr. 555-558).

of the stolen property he had seen inside (Tr. 729). Monroe then went to the United States Attorney's Office to get a search warrant for the apartment (Tr. 729-730).

At about 5:21 P.M., Eric Daniels, having returned from his trip to 23rd Street, together with Don Daniels and Kenneth Brown, left the apartment and were arrested in a rented tan 1976 Camaro (Tr. 831) which had been rented at Kennedy Airport at 11:35 A.M. that day.*

At about 5:25 P.M., subsequent to the arrest of the three male defendants, the postal inspectors and police who were outside 22 West 121st Street approached the house and one of the police officers knocked on the window. Someone opened a louver blind or shutter from inside the apartment and quickly shut it. The police and agents waited a minute and then broke into the apartment (H. 106;** Tr. 896). The apartment was searched for Sylvia Diaz, and it was discovered that she had left through another door and went upstairs to another apartment (Tr. 1092-1093). Monroe subsequently obtained the search warrant at about 9 P.M., getting the warrant signed at the magistrate's house and returned to the apartment, which was being safeguarded by fellow Postal Inspectors (Tr. 730).

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* Prior to renting this car, Don Daniels had on April 30, 1976 requested a large dark green or a dark blue car preferably a Ford and had in fact rented a dark green Volare' at 12:59 A.M. on May 1, 1976 at Kennedy Airport using his Bank Americard (GX 178) and Missouri Driver's License (GX 111). This car was returned at 11:35 .A.M. May 1, 1976 at Kennedy Airport and in its place Daniels took the tan Camaro in which the three defendants were arrested (Tr. 929-946; GX 18, 18A, 19, 19A, 20). The Bank Americard was in Don Daniels possession at the time of his arrest (Tr. 837-838; GX 178). The Missouri driver's license was found in Eric Daniels possession (Tr. 838; GX 111).

** "H" refers to pretrial hearing minutes.

As a result of the execution of the search warrant, numerous items of evidence were seized in the apartment at twenty-two West 121st Street by Inspector Monroe (Tr. 736-738). Postal property, found at 22 West 121st Street as a result of the execution of the search warrant was identified by the manager of the Hellgate station (Tr. 329-332, 334-336, 375-377, 377-381). Most significant was the fact that all 1,004 of the domestic money orders were recovered there (Tr. 904; GX 8, 9, 29, 32, 33, 40, 41, 44, 45, 46, 47). Additionally, the agents found the rifle (GX 2); the handgun (GX 3, 3A, 3B, 3C); an army-type duffle bag (GX 1); the postal cash boxes and insert (GX 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1GG); the equipment list drawn by Cornwall (GX 21); the torn diagrams of the Hellgate Post Office (GX 26, 26A, 26B, 26C, 27, 27A, 27B, 27C, 27D); the money order ledger (GX 52, 52A, 52B, 52C, 52D); Kenneth Brown's black briefcase (GX 93); a blue postal sweater (GX 94); Don Daniels' brown shoulder bag (GX 95); Don Daniels' brown suitcase (GX 96), the money order machine (GX 97); an employment identification card in the name of Sylvia Diaz (GX 108); an American Airlines identification card in the name of Eric Daniels (GX 109); Eric Daniels' briefcase (GX 115); Kenneth Brown's college identification card (GX 115A); identification card of Kenneth Brown (GX 115B); various personal documents belonging to Kenneth Brown (GX 115C, 115D, 115E, 115G, 115H, 115I, 115J, 115K, 115L, 115M, 115N, 115O, 117, 118, 135, 149); Kenneth Brown's passport (GX 115F); post office validating plate ledger (GX 122); 25 postal machine limitation plates (GX 123); postal machine validating plate (GX 124); postal bag (GX 133); a brown hat (GX 136); three blank board of election cards (GX 137); Eric Daniels' hat (GX 158; Tr. 279, 562).

Fingerprints of defendant Don Daniels were found on Government's Exhibits 19, 18A, 20,22, 23, 24, 25, 26A, 26, 26C, 27D, 27, 42, 37, 43, 48, 47, 45, 41, 44, 39, 46, 36, 40, 38, 49, 50 and 51 (Tr. 962). Fingerprints of Eric Daniels were found on Exhibits 31, 34, 32, 33, 30, 27B (Tr. 962). A fingerprint (GX 35) lifted from GX 1GG (cash box change insert was found to be that of Kenneth Brown (Tr. 959, 755-768).

The Defense Case

Eric Daniels presented no evidence.

Don Daniels presented brief testimony by Robertto M. Boirie, who testified that Don Daniels had been ordained a minister during the week prior to Boirie's testimony and that as part of the custom of Daniels' religion, one would wear a head-dress and one would shave his head (Tr. 1157-1159). Boirie did not know what religion Daniels was ordained to; what training for the ministry Daniels had received or what duties he would perform as a minister (Tr. 1159-1160).

Kenneth Brown presented the testimony of Marsha Daniels, a sister of defendants Eric Daniels and Don Daniels. She testified that on Friday, April 30, 1976, she was present at Cornwall's apartment from approximately 10 P.M. to 11:30-12 Midnight with a number of other people. She further testified that Kenneth Brown, whose nickname was "Cardine," was present she did not recall what Brown was carrying, but saw no gun (Tr. 1164-1167).

Marsha Daniels was not cross-examined.

ARGUMENT

POINT I

The Search of the Apartment at 22 West 121 Street Pursuant to a Search Warrant was Totally Proper.

A significant portion of the proof against the defendants consisted of evidence seized on the basis of a search warrant at the ground-floor apartment at 22 West 121st Street. Eric Daniels, conceding that the execution of the warrant was proper (Br. at 7), claims (as he did at trial) that since the warrant was based upon information received by Postal Service Inspector Monroe during an initial entry into the apartment, that warrant was tainted. This claim is frivolous.* Inspector Monroe's initial entry into the apartment was entirely proper.

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*It should be noted that Daniels never satisfied the burden placed upon him, *United States* v. *Galante*, Dkt. No. 76-1165, slip op. 959, 967 (2d Cir., December 14, 1976); *United States* v. *Masterson*, 383 F.2d 610, 613-14 (2d Cir. 1967), *cert. denied*, 390 U.S. 954 (1968), of demonstrating that he has standing. There is no standing to contest a search if the defendant "(a) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States*, 411 U.S. 223, 229 (1973). Daniels clearly never met the first two standards; the mere fact that he may have used the apartment to store illicit goods is not in itself enough to give him a possessory interest. *United States* v. *Galante*, *supra*, slip op. at 968. Furthermore, he does not have "automatic" standing under the third *Brown* requirement, since the indictment

[Footnote continued on following page]

At about 10 A.M. on May 1, 1976, Postal Inspector Monroe received a call from his base advising that there had been a robbery at the Hellgate Station Post Office. Monroe went to the Hellgate Station at 153 East 110th Street and assisted in the investigation of the robbery (H. 46-47).

During the course of his investigation, Katherine Stubbington made a telephone call, with Monroe listening on an extention phone, to Eric Daniels, during which she advised Eric Daniels that she had a man who could provide false identification. Eric Daniels replied "Good, we'll throw him a couple of hundred dollars." Eric Daniels then told Stubbington to come to 22 West 121st Street (H. 61).

At about 3:30 P.M.-4:00 P.M. Monroe and Stubbington went to the apartment in a brownstone house at 22 W. 121st Street. Stubbington knocked on the window and somebody held the curtain back, and then Kenneth Brown, who identified himself as "Gene," came to the inner gate and opened that gate (H. 48, 62-63). Monroe was introduced to Brown and Brown looked at Monroe and Stubbington and then said "Come on in" (H. 63-64).

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did not allege that he was in possession of the goods *at the time of the seizure*. At any rate, such "automatic" standing could be found only with respect to those counts explicitly charging possession; Daniels could not be found to have standing on the other counts, as to which he received concurrent sentences. See *United States* v. *Galante*, *supra*, slip op. at 965-66. Finally, it should be noted that the failure of the Government to rely on this position at trial does not bar this Court from rejecting Daniels' position on this ground alone; indeed, this Court has held that an *explicit* concession of standing by the Government is not binding on this court on appeal. *United States* v. *Tortorello*, 533 F.2d 809 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3300 (Oct. 19, 1976).

Once inside the apartment Monroe saw postal money orders stacked on a coffee table in front of the couch, some were enclosed in Post Office wrappers. In addition Monroe observed a postal money order machine and a green duffle bag which was full of something unknown (H. 49-51, 67). Stubbington handed Monroe a money order, and he observed that it was from the same series of money orders taken during the robbery earlier that day (H. 52-53, 58-59). Monroe later left the apartment, advised fellow agents as to what and whom he had seen in the apartment, and went to the United States Attorney's Office to get a search warrant (H. 53-54). After obtaining the search warrant, he returned to the apartment at about 9:15 P.M. to conduct the search (H. 54, 68).*

B. The trial Court's ruling

In denying the defendant's motion to suppress the evidence seized at 22 West 121st Street, Judge Goettel found that ". . . all of the evidence so far has been to the effect that the warrant rested solely upon Mr. Monroe's initial entry in the company of the woman earlier.

"While all defense counsel have continually said that Mr. Monroe does not know how he got in, that's only

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* While Monroe was at the United States Attorney's Office preparing the search warrant, a phone call was received from one of the agents who was inside the apartment following the arrests. Monroe received no information from the agents present in the apartment as to what they saw and his affidavit for the search warrant was based solely on what he had seen in the apartment on his first visit at 3:30 P.M. to 4:00 P.M. (H. 76-78, 88-89). Monroe recalled that the Assistant United States Attorney who had received the call from the agents in the apartment had told the agents not to touch anything until Monroe arrived with the search warrant. (H. 94-95).

literally true to the extent that he's uncertain as to what order the three of them (including Kenneth Brown) entered the apartment and who opened the door or whether or not it was closed.

"In terms of how he effected his entry, the evidence was quite clear that it was effected pursuant to prearrangements made by his lady companion with one of the occupants of the apartment, that he was met at the gate by one of the occupants and that he was admitted voluntarily" (H. 124).

Daniel's assertion that the District Court was incorrect in concluding, on the clear facts before him, that Monroe's initial entry into the apartment was voluntary * is wholly without basis. It is perfectly apparent from the testimony of Agent Monroe (both at the hearing and at trial) and that of Katherine Stubbingt n that the entry of Monroe was precipitated by an express invitation of Eric Daniels over the telephone, and the equally clear consent of Kenneth Brown ** at the time of the actual entry.***

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* A finding of voluntary consent is "a question of fact to be determined from all the circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-49 (1973), and thus the conclusion of the trier of fact is entitled to great weight. *United States* v. *Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976). See also *United States* v. *Wiener*, 534 F.2d 15, 17 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3249 (October 5, 1976) (finding of valid consent will not be set aside unless "clearly erroneous").

** Daniels makes no claim that Brown, the possessor of the apartment, was not empowered to consent to an entry into the apartment. See *United States* v. *Matlock*, 415 U.S. 164, 165-66 (1974); *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969).

*** Mr. Monroe:

"(continuing) The person identified to me as 'Gene' opened the inner gate and Kathy said 'Hi,' and she introduced me

[Footnote continued on following page]

Furthermore, the law is crystal clear that the Fourth Amendment does not prohibit such entries. The law in this area was summarized in *United States* v. *White*, 401 U.S. 745, 749 (1970), where Justice White, speaking for a plurality of the Court, noted:

> "*Hoffa* v. *United States*, 385 U.S. 293 (1966), which left undisturbed *Katz* v. *United States*, 389 U.S. 347 (1967) held that, however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances 'no interest legitimately protected by the Fourth Amendment is involved,' for that amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' *Hoffa* v. *United States*, at 302. No warrant to 'search and seize' is required in such circumstances, nor is it when the Government

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as 'Woody' and he looked at me and looked at her and said 'Come on in,' and we went inside" (H. 63-64).

". . . A person who later introduced himself to me as Gene opened the gate in the court yard, said 'Come on in.'

So I stepped inside the gate following Kathy Stubbington, and the hallway door was opened. So I stepped inside the hallway door. Then we went into the apartment." (Tr. 724-725).

Ms. Stubbington: ". . . We got to the address and I knocked on the window and someone looked through the shutters, and then came out to open the iron gate. We went through the iron gate, through another door and then into the apartment.

Q. Now, who opened the gate?

A. The gentleman was introduced to me inside the apartment as 'Gene'." (Tr. 1017).

> sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused. *Lewis* v. *United States*, 385 U.S. 206 (1966), or when the same agent well known to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez* v. *United States*, 373 U.S. 427 (1963)."

Indeed, *Lewis* v. *United States*, *supra*, in which a Government agent entered the defendant's home in the guise of being an accomplice, is dispositive of this case. Accord, *United States* v. *Wilner*, 523 F.2d 68 (2d Cir. 1975); *United States* v. *Boggus*, 411 F.2d 110, (9th Cir.), *cert. denied*, 396 U.S. 919 (1969); *United States* v. *De Sapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

None of the cases cited by Daniels stands for or even hints at a different proposition, and thus do not bear comment here. His claim that the Government failed to meet its burden of proof in demonstrating the voluntariness of the consent is simply belied by the record, in which the uncontradicted evidence demonstrated the both Daniels and Brown thought that Monroe was a potential accomplice. There was, in short, absolutely *no* evidence tending to show that the consent was in any way coerced.

POINT II

Eric Daniels Was Not Deprived of a Fair Trial.

Daniels makes two separate claims that he was denied a fair trial. He claims first that Judge Goettel made a comment that could only lead the jury to believe that he thought the defendants were guilty, and second that the redirect examination of Cornwall was improper. Neither claim is supported by law or fact.

None of the five victim witnesses to the Post Office robbery was able to make an in-court identification of any of the defendants. The only postal employee other than Cornwall who was able to identify any one of the three defendants as being at the Post Office the day of the robbery was Robert Neely.

Mr. Neely, a letter carrier, testified that he was delivering a letter to a lady in the garage bay area where he saw three black men going into the Post Office. Two of the men were dressed in dark clothing and one had on a Post office sweater (GX 94) and a hat (GX 158). The two men walking behind the man with the postal sweater were carrying duffle bags (GX 1). After he gave the lady the mail, Mr. Neely walked back into the Post Office and saw the three standing around the dispatcher's desk. He then went upstairs and back to work. (Tr. 277-280). At the time Neely saw the three men, none was wearing masks. (Tr. 281). Mr. Neely was asked if he saw any of the three in the courtroom.*

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* The full colloquy was as follows:

"A. Well, I'm not too sure.

Q. Tell us if you see somebody and how sure you are it is them.

Mr. Levner: I will object to the gratuitous comment.

Mr. Kelleher: The witness replied.

The Court: The witness replied very softly as you probably could not hear, 'I'm not too sure.'

Mr. Kelleher: He can put a qualification on that.

Mr. Schmukler: I object to that. If this witness can unequivocally state who he saw in this courtroom, I have no objection. But if he says I think——

The Court: If anyone who tells you they can make an unequivocal identification of anybody is either deceiving himself or the Court. All he can give us is his best opinion on it and in some instances he does not have to say that person looks somewhat like the person I saw.

[Footnote continued on following page]

Judge Goettel's statements were entirely proper under the circumstances. Indeed, Mr. Schmukler's comments on common sense were the precipitating cause of Judge Goettel's statement. Mr. Schmukler's comment could only give

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Mr. Schmukler: Common sense tells us that there are only three defendants sitting at the defense counsel table.

The Court: So far you have not had too bad luck in that regard.

The question is whether this witness can recognize any of the three men he saw for the limited period of time he saw them or if he sees anyone who looks similar to them.

Mr. Levner: I respectfully request that, that last statement about luck be withdrawn.

The Court: I certainly withdraw whatever I said. I am saying up until the date no witness has made an identification of the people. To the extent that Mr. Schmukler is suggesting that they are going to identify them simply because they are at the defense table, experience has not borne that out.

The Witness: I see one defendant, in the beige suit.

Mr. Kelleher: Indicating defendant, Eric Daniels, Your Honor.

The Court: Well, the only one wearing a beige suit there is Mr. Daniels, Mr. Levner and Mr.——

The Witness: This one right here.

Mr. Schmukler: I just wanted to make sure he wasn't identifying me.

The Court: Mr. Daniels, stand up for a moment to make sure it is your beige suit that is being referred to.

The Witness: Yes, the one that had on the Post Office sweater.

The Court: He had a Post Office sweater on?

The Witness: Yes.

Q. And a hat?

A. Yes.

Q. How sure are you?

A. I'm pretty sure.

Q. You are sure that's him?

A. Right.

The Court: Do you recognize either of the other two?

The Witness: No.

The Court: You cannot do so, is that correct?

The Witness: Yes." (Tr. 282-285).

the improper impression that the witness was about to make a choice from a limited number of people sitting at defense table, when in fact Mr. Neely was asked on direct examination:

> "Q. I ask you to stand up, Mr. Neely, take a look *around the courtroom*, the *entire courtroom*, and tell me and the Court and the jury if you see any of the persons that you saw that day going into the post office?" (Tr. 282). (Emphasis supplied)

Prior to Mr. Levner's objection Judge Goettel pointed out that the witness had seen the three men for a limited period of time (Tr. 283). After Mr. Levner's objection Judge Goettel stated that he withdrew whatever he had said and again emphasized the fact that at that point none of the government's witnesses who had previously testified had identified any of the defendants. Judge Goettel was merely clearing up the confusion created by Mr. Schmukler's remark about Neely's identification being confined to the defense table.* Thus, if anything, the Judge's statements about the collective failure of the government's witnesses to identify any of the defendants was helpful to the defendants and not prejudicial. Indeed, only Mr. Levner's objection and not Judge Goettel's statements, could have given the jury the idea that the judge had any opinion about the case.

Even assuming Judge Goettel's statements were improper the jury was informed both prior to testimony and in the charge to the jury that they and they alone were the triers of fact (Tr. 126-127, 1317-1318). Judge Goettel in his charge further instructed the jury both before and after testimony was received that they were to

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* The in-court identification of Eric Daniels was further supported by Mr. Neely's pre-trial photo identification of Eric Daniels on May 17, 1976. (Tr. 286-287, 299-300; GX 159).

disregard any statement or ruling of the court as to fact matters (Tr. 127, 1319). Additionally Judge Goettel at the time he made his statement to the jury, subsequently told them that he was withdrawing it and clarified what he meant (Tr. 284). There is absolutely no indication in the record, as claimed by Daniels, that Judge Goettel gave "the jury the impression that the defendant's case is of little substance and not worthy of much attention." (Brief p. 11).

As this court has said in *United States* v. *Nazzaro*, 472 F.2d 2,303 (2d Cir. 1973)

> ". . . a judge's participation during trial—whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct—must never reach the point at which it appears clear to the jury that the court believes the accused guilty."

See also *United States* v. *Fernandez*, 480 F.2d 726, 735-37 (2d Cir. 1973). In this case, as the review of the entire facts demonstrates, there was simply no error at all, and certainly no error of sufficient dimension to require a new trial. When viewed in the context of the entire trial, as it must, *United States* v. *Bivona*, 487 F.2d 443, 446-47 (2d Cir. 1973), the statement was simply an isolated incident that could have had no adverse impact on the jury. See *United States* v. *Araujo*, 539 F.2d 287 (2d Cir. 1976); *United States* v. *Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3416 (December 7, 1976); *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975); *United States* v. *Newman*, 481 F.2d 222 (2d Cir. 1972), *cert. denied*, 414 U.S. 1007 (1973).

Daniels' second claim concerns the redirect testimony of Patricia Cornwall. During cross-examination of this Government witness, defense counsel made many references to Cornwall's admitted false testimony during her appearance before a grand jury (Tr. 628, 640-648, 656-

662, 667, 679-682, 695, 702, 703-704). On redirect examination, the prosecutor endeavored to rehabilitate Ms. Cornwall (who sometimes used the name Booth, see Tr. 473) by reading from a later grand jury appearance.* In doing so, the prosecutor, totally by inadvertence, read the statement about which Daniels complains from the wrong page of the grand jury minutes.**

This minor episode could not have deprived the defendants of a fair trial, and the trial judge properly denied a mistrial. First, it should be noted that even if the introduction of the remark had been intentional rather than inadvertent, the statement would have been admissible

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* Absolutely no claim is made that this rehabilitation was not itself proper.

** The entire sequence was as follows:

"Q. Let me ask you, Ms. Booth, when you testified here yesterday you have already said that you did not tell the truth. Was that because you were afraid?

A. Yes." [Reading from grand jury minutes.]

I'm sorry, I read from the wrong page. The bottom of page 9.

Mr. Schmukler: I would ask that that be stricken from the record.

The Court: Yes, it will be.

Mr. Kelleher: Government consents. I read from the wrong page, your Honor.

Mrs. Barlow : Your Honor, we have a motion for a mistrial at this juncture.

The Court: Based on that limited statement?

Mrs. Barlow: Yes, your Honor.

The Court: Let me have the reporter read it back to me at the bench.

(Record read at side bar)

The Court: I direct the jury to strike from their minds the reading of the grand jury testimony which Mr. Kelleher inadvertently read and pay no attention to it whatever and forget it completely. I deny the motion for a mistrial.

Mr. Kelleher: I apologize. (Tr. 705-706).

into evidence. It is settled law that when a witness has been impeached on the basis of a prior inconsistent statement, he may be rehabilitated by permitting him to explain the cause of the inconsistency. Thus, the Government may show that the inconsistency was due to a witness' fear for the safety of himself or his family. *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 130 (2d Cir., October 14, 1976); *United States* v. *Franzese*, 392 F.2d 954 (2d Cir. 1968), vacated per curiam on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310 (1969); *United States* v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States* v. *Cirillo*, 468 F.2d 1233, (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Berger*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971). While the defendants would have been entitled to an instruction concerning the uses of such testimony, no defendant requested one. Second, the very brief mention of fear did not even suggest that any of the defendants on trial were the cause of the fear, and thus could not have prejudiced them in any way. Finally, Judge Goettel not only told the jury to disregard the statement, but no further mention was made of it during the rest of the trial, and certainly the prosecutor in summation did not take advantage of the inadvertence. In short, the claim of prejudice is meritless.

POINT III

The Aiding and Abetting Charge Was Properly Given to the Jury.

Brown asserts that since the words "aiding and abetting" do not appear in the indictment, the Government was not entitled to an aiding and abetting charge. As he recognizes in part, this Court has held on numerous occasions that a charge of aiding and abetting need not be contained in the indictment at all. *United States* v.

Bommarito, 524 F.2d 140, 145 (2d Cir. 1975); *United States* v. *Taylor*, 464 F.2d 240, 242 n. 1 (2d Cir. 1972); *United States* v. *Tropiano*, 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). In this case, the inclusion in the indictment of a reference to section 2 of Title 18, United States Code, could only have alerted any person capable of reading that the Government intended to rely on that theory. *United States* v. *Houle*, 490 F.2d 167, 170 (2d Cir.), *cert. denied*, 417 U.S. 970 (1974); that same information could also have been discovered by pre-trial discovery * and must have been apparent from the facts of the case in any event.** In short, this claim is frivolous.

POINT IV

The Overt Acts Charged in the Indictment Were Proper.

Brown claims that the indictment was defective since it did not allege at least one overt act that is totally apart from the acts establishing the conspiracy. This claim is totally without merit.***

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* Indeed, the record shows that all counsel had actual knowledge that the Government was relying on an aiding and abetting theory (Tr. 14, 18).

** Brown's summary of the evidence against himself is hardly accurate. As previously stated he engaged in the discussion to obtain false identification which took place only eight hours after the post office was robbed. Additionally, there is the statement made by co-conspirator Eric Daniels as to Brown's involvement as well as the appearance of Brown's fingerprint on the change draw insert (GX 1GG) stolen from the Post Office. He also fails to mention the numerous personal documents of Brown and his business found at 22 W. 121 Street.

*** The Government is somewhat hampered in even understanding Brown's claim since *not one* of the decisions upon which he relies in his brief appear at the citations given, or even in the same volume.

[Footnote continued on following page]

As the Supreme Court has noted in *Yates* v. *United States*, 354 U.S. 298, 334 (1956),

> "The function of the overt act in a conspiracy is simply to manifest 'that the conspiracy is at work,' *Carlson* v. *United States*, 187 F.2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."

Accord *United States* v. *Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966). The fact that the conspiracy in this case took considerably more than one step beyond a mere "project" was not only overwhelmingly clear from the proof at trial (which showed that the objects of the conspiracy were actually achieved) but also from the allegations in the overt acts themselves. Furthermore, this Court has held that the Government may rely in meeting the overt act requirement on acts not even alleged in the indictment. *United States* v. *Fassoulis*, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States* v. *Armone*, *supra*, 363 F.2d at 400; *United States* v. *Negro*, 164 F.2d 168, 173 (2d Cir. 1947).* Thus, even if the deficiencies claimed by Brown existed—which they do not—that would not affect the validity of the conviction.

Furthermore, since Brown did not raise this claim prior to trial, he has waived it. The claim (to the extent we understand it) is essentially that the allegations in the indictment were defective. As such, it should have been raised prior to trial. F.R. Crim. 12(b)(2).

* Indeed, the Government may rely upon such an unalleged overt act to establish proper venue. *United States* v. *Downing*, 51 F.2d 1030, 1031 (2d Cir. 1931).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

WILLIAM J. KELLEHER, JR.,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

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COUNTY OF NEW YORK) ss.:
Southern District of New York

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That on the 21st day of January, 1977, he served ~~a~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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